93-432

No. _____

Supreme Court, U.S.
FILED
SEP 16 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee),
JULIA CORPUS de MORALES (Widow),
JUAN ANTONIO MORALES and DANIEL MORALES
(Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
(Insurer),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Georgia

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Georgia's workers' compensation statute violates the Equal Protection Clause of the Fourteenth Amendment by limiting employees' death benefits to a maximum of $1,000.00 if they are survived by non-resident alien dependents (who are not citizens or residents of the United States or Canada), while granting all other employees uncapped benefits for their dependents?

2. Whether Georgia's workers' compensation statute imposes additional burdens on the terms of residence of alien workers in conflict with Congress's exclusive authority over naturalization and immigration policy, rendering the statutory provision at issue invalid under the Supremacy Clause?

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(Employer)
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

COMES NOW Julia Corpus de Morales, widow of the deceased employee, Jose A. Morales, and mother of their minor children Juan Antonio Morales and Daniel Morales, and respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Georgia (App. 2A-13A) is reported at 263 Ga. 190 (1993) and at 429 S.E.2d 671 (1993). The opinions of the Superior

Court of Fulton County, State of Georgia (App. 14A-19A), the State Board of Workers' Compensation (App. 20A-21A), and the Administrative Law Judge for the State Board of Workers' Compensation (App. 22A-26A) are unreported.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on May 24, 1993, and a petition for reconsideration was denied on June 18, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 34-9-265 (1991)

> (b) If death results instantly from an accident arising out of and in the course of employment or if during the period of disability caused by an accident death results proximately therefrom, the compensation under this chapter shall be as follows:
>
> . . .
>
> (2) The employer shall pay the dependents of the deceased employee, which dependents are wholly dependent on his earnings for support at the time of the injury, a weekly compensation equal to the compensation which

> is provided for in Code Section 34-9-261 for total incapacity;
>
> . . .
>
> (5) If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not exceed $1,000.00.

STATEMENT OF THE CASE

Statement of Facts

Jose Morales was employed as a construction worker by Barge-Wagener Construction Company in Atlanta, Georgia, when he fell 22 stories to his death on September 19, 1990. His death occurred in the course of his employment and was compensable under Georgia's Workers' Compensation Act. Thus, Mr. Morales' family was barred from bringing a tort suit against his employer to recover for his death. However, the death benefits regularly provided under Georgia's Workers' Compensation Act were also unavailable.

Jose Morales was a Mexican citizen and legal alien residing in the United States of America. His wife, Julia Corpus de Morales, and two minor children, Juan Antonio Morales and Daniel Morales, were solely dependent upon him for their support and were citizens and residents of Mexico. Because Mr. Morales was an alien and his family did not reside in either the United States or Canada, his death benefits under Georgia law were limited to the sum of $1,000.00.

Proceedings Below

This case was first decided by the Administrative Law Judge (ALJ) for the State Board of Workers' Compensation for the State of Georgia. The constitutionality of the state statute limiting recovery of death benefits to the dependents of alien workers who reside outside the United States or Canada (O.C.G.A. §34-9-265(b)(5)) was challenged in the first instance by Petitioners in this proceeding. (App. 24A-25A)

While the ALJ found that she was without jurisdiction to rule on the constitutionality of the statute, she stated that, "[i]t is my opinion that the dependents will prevail on this issue, there being no apparent rational basis for the legislature to distinguish between citizens of Canada and citizens of any other country that might be working in the United States and injured [sic] on the job." (App. 24A)

Instead of awarding a weekly benefit until the widow reached age 65 and the minors reached 18, graduated high school or finished college – an amount equal to several hundred thousand dollars – the ALJ awarded the statutory maximum of $1,000.00 available if alien workers' dependents are not citizens or residents of the United States or Canada. The ALJ's decision was upheld on review by the State Board of Workers' Compensation. (App. 20A-21A)

On appeal to the Superior Court of Fulton County for the State of Georgia, the Court reversed and held the discriminatory death benefit provision to be unconstitutional under the Georgia Constitution, finding both a violation of the Equal Protection Clause and a denial of a fundamental property right. (App. 14A-19A) Having made its decision under the Georgia Constitution, the Court found it unnecessary to reach the federal constitutional claim. (App. 19A)

The employer's insurance company appealed to the Georgia Supreme Court, which reversed again and upheld the constitutionality of the state statute. (App. 8A) The Court focused exclusively on the rights of the non-resident alien dependents, and refused to consider that the statute violated Mr. Morales' rights under the Equal Protection Clause. (App. 4A) The Court held that:

> O.C.G.A. §34-9-265(b) surely discriminates against Mr. Morales' family in Mexico, but it is not unlawful. They must settle for what the legislature of this state is willing to provide.

(App. 6A)

ARGUMENT SUPPORTING THE GRANT OF THE WRIT

I. INTRODUCTION

This case calls upon the Court to revisit the constitutional issues raised by *Graham v. Richardson*, 403 U.S. 365 (1971), and its progeny that largely struck down this nation's troubling legacy of state laws enacted since the turn of the century which discriminated on the basis of alienage. The judgment of the Georgia Supreme Court sustaining the constitutionality of Georgia's workers' compensation death benefit provision which limits recovery based on alienage strongly conflicts with this Court's precedents under the Equal Protection Clause, as well as the Supremacy Clause. Furthermore, there is a split among the highest state courts of six states that have reviewed comparable provisions which requires resolution by this Court.

Certiorari should be granted in this case to review whether Georgia's Workers' Compensation Act violates the Equal Protection Clause by limiting the recovery of death benefits for employees survived by non-resident alien dependents who are not citizens or residents of the

United States or Canada to a maximum of $1,000 while all other employees' dependents receive uncapped benefits based upon the earnings of the deceased employee. O.C.G.A. § 34-9-265 (1991). In the instant case, the Georgia statutory scheme deprived Jose Morales of the same workers' compensation death benefits coverage for family dependents residing in Mexico as were extended to his American and Canadian co-workers for their family dependents.

The Georgia Supreme Court's decision, determining that the statutory classification's discriminatory impact on Jose Morales does not trigger coverage of the Equal Protection Clause, is contrary to this Court's long standing analysis of workers' compensation laws as well as established equal protection doctrine. *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Graham v. Richardson*, 403 U.S. 365; *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Madera Sugar Pine Co. v. Industrial Accident Commission of California*, 262 U.S. 499 (1923). The decision harkens back to an era when statutory discrimination on the basis of alienage was routinely and summarily approved. *See, Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 (1976); *In Re Griffiths*, 413 U.S. 717, 718-722 (1973) (tracing history of the Court's treatment of alien restrictions and doctrinal changes); M. Konvitz, *The Alien and the Asiatic in American Law*, (1946).

This issue presents an important question of federal law which potentially impacts several million aliens living and working in the United States. The dilemmas faced by this society in admitting and integrating its immigrant population dominate many aspects of government decision making today. This case represents but one aspect of that web of critical legal issues of constitutional magnitude concerning alienage which this Court has consistently viewed as important to resolve since its decision in *Graham*, 403 U.S. 365.

The Georgia Act's discriminatory classification scheme is reflected in the workers' compensation laws of many other states, which included similar alienage-based classifications in the original legislative enactments of their respective workers' compensation laws passed in the first two decades of this century. In reviewing the constitutionality of these statutes, the highest courts of six states have ruled in a divided fashion. The Georgia Supreme Court and the Supreme Courts of New Mexico, Arizona and Utah have resolved this question to uphold the statute, while the Supreme Courts of Florida and Kansas have most recently expressly held such provisions to be unconstitutional. These decisions on the legal questions raised by the instant case bespeak both the significance of the issues presented as well as the need for the Court's grant of the writ to clarify and render uniform the appropriate, controlling constitutional principles to be applied.

For these compelling reasons, the Court should grant the Petition and vacate the judgment below.

II. THE GEORGIA STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE BY IMPERMISSIBLY DISCRIMINATING ON THE BASIS OF ALIENAGE.

A. THE GEORGIA SUPREME COURT IMPROPERLY FAILED TO FOCUS ITS CONSTITUTIONAL ANALYSIS ON THE RESIDENT ALIEN WORKER WHO HAS BEEN DEPRIVED OF WORKERS' COMPENSATION PROTECTION FOR HIS FAMILY.

The Georgia Supreme Court erred by narrowly focusing its constitutional analysis of O.C.G.A. § 34-9-265(b)(5) on the independent legal rights of the non-resident alien dependents of the deceased wage earner. Determining

that the legal right to receipt of benefits vests solely in the worker's dependents after the death of the worker, the Court next concluded that such dependents did not come within the coverage of the Fourteenth Amendment, as they resided outside the territorial jurisdiction of the United States. App. 6A. In this manner, the Court sustained against constitutional challenge a blatantly discriminatory statutory provision which restricted the workers' compensation insurance coverage of resident aliens who die leaving non-resident alien dependents.

This Court's landmark equal protection cases in the social insurance arena demonstrate the critical flaw in the Georgia Supreme Court's decision. *E.g., Wengler,* 446 U.S. 142; *Califano v. Goldfarb,* 430 U.S. 199 (1977); *Wiesenfeld,* 420 U.S. 636. The Court's precedents establish that the focus of the equal protection analysis in this case must be centered on the rights of the resident alien workers who are denied under the Georgia statute the broad scope of insurance coverage for their dependent family members which is enjoyed by their American and Canadian co-workers. This treatment is wholly consistent with the Court's decision in *Madera,* where this Court upheld a state workers' compensation statute mandating the payment of death benefits to non-resident alien dependents against a Fourteenth Amendment due process challenge *precisely based on its refusal to divide the rights of covered workers under the Act from those of their beneficiaries. Madera,* 262 U.S. at 504.

Wiesenfeld, Goldfarb, and *Wengler* addressed statutory classification schemes which awarded more restricted insurance benefits to male dependents of deceased female wage earners than to female dependents of deceased male wage earners. In each of these cases, the Court's decision analyzed this disparate scheme of benefits as "discrimination against the covered wage earning female." *Goldfarb,* 430 U.S. at 207. The Court expressly held that such classification schemes operate "to deprive

women of protection for their families which men receive as a result of their employment." *Wiesenfeld*, 420 U.S. at 645.

The key to the Court's constitutional analysis has been that such statutes discriminate by granting female workers less potential insurance protection for their dependent family members than male wage earners, despite the workers' equal labors and economic contributions to the society.

Thus, in *Wengler*, 446 U.S. 142, the Supreme Court held unconstitutional the Missouri workers' compensation statute which mandated different standards for the award of death benefits to the dependents of female as opposed to male workers. The female wage earner constituted the focal point of the Court's equal protection analysis:

> The benefits, therefore, that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner.
>
> It is this kind of discrimination against working women that our cases have identified and in the circumstances found unjustified.

Id. at 147.

Similarly, in *Goldfarb*, the Court invalidated a provision of the social security laws providing more restrictive terms of survivors' benefits coverage for female employees than male employees. *Goldfarb*, 430 U.S. at 208. *See also, Wiesenfeld*, 420 U.S. at 645 ("[t]he Constitution . . . forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men"); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *Id.* at 691 (Powell, J., concurring in judgment); *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 682, n.22 (1983).

Wiesenfeld, Goldfarb, and *Wengler* expressly rejected the position (used by the Georgia Supreme Court in the instant case) that the focus of equal protection analysis should be on the rights of the dependent beneficiaries as opposed to the covered wage earner. As the Court summarized in *Goldfarb:*

> *Weinberger v. Wiesenfeld* rejected the virtually identical argument when appellant's predecessor argued that the statutory classification there attacked should be regarded from the perspective of the prospective beneficiary and not from that of the covered wage earner . . . *The Court, however, analyzed the classification from the perspective of the wage earner and concluded that the classification was unconstitutional because* "benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex." 420 US at 647, 43 L Ed 2d 514, 95 S Ct 1225. Thus contrary to appellant's insistence . . . *Wiesenfeld* is "dispositive here."

Goldfarb, 430 U.S. at 207 (emphasis added). *See also, Wengler,* 446 U.S. at 153, n.6.

By erroneously confining its initial analysis to the question of which individuals possess the ultimate right of recovery of death benefits under state law, the Georgia Supreme Court's decision in this case effected an "end run" around settled equal protection doctrine to save an archaic and discriminatory statutory provision.[1] However, federal constitutional principles, as opposed to state

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[1] By focusing exclusively on the rights of the non-resident alien dependents, the Court avoided the equal protection analysis, holding that such individuals were beyond the protection of the Equal Protection Clause. However, unlike the hostile enemy decision reached in distinguishable circumstances in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), this Court has held

law, determine the application and construction of the Equal Protection Clause of the Fourteenth Amendment. *E.g., Wengler,* 446 U.S. 142; *Nyquist v. Mauclet,* 432 U.S. at 7-12; *Sugarman v. Dougall,* 413 U.S. 634, 641-645 (1973); *Graham v. Richardson,* 403 U.S. at 374-376. *Cf., Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 39 (1976) (federal constitutional law determines whether state governmental procedures and interests give rise to legitimate claims of entitlement protected under the Fourteenth Amendment); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 641 (1985) (individual's right to due process with respect to state property interests is determined as a matter of federal constitutional law and cannot be "diminished by the fact that the State may have specified its own procedures that it may deem adequate").

Where a federal question is presented, the mere fact that a state court interprets state law to avoid or defeat the constitutional claim will not preclude federal constitutional review. State law cannot be semantically parsed so as to avoid the application of the Equal Protection Clause to a statutory classification scheme resulting in such a fundamental disparity in employees' workers' compensation coverage, clearly tied to the alienage of the employees and their families. As Justice Blackmun wrote in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), it is not enough for a court to interpret legislative intent. "*This Court still has an obligation to view the classificatory system,* in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary." *Id.* at 441 (emphasis added) (Blackmun, J., concurring).

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that the reach of the Equal Protection Clause extends to persons "subject to the laws of a State." *Plyler v. Doe,* 457 U.S. 202, 215 (1982). It is an open question whether the Equal Protection Clause applies to non-resident aliens subject to the laws of a state, although authority exists to support this position. *E.g., Alegria v. United States,* 945 F.2d 1523 (11th Cir. 1991).

In contrast to the Georgia Supreme Court's decision, this Court's decision in *Madera*, 262 U.S. 499 ~~—one of the~~ Court's earliest cases reviewing the constitutionality of a state workers' compensation law – treated the law's classification system as a *unitary system* of benefits based upon coverage of the deceased worker. The Court focused on the universal principles on which workers' compensation statutes operate to find that the purpose of these statutes was always compensation for the employee's injuries, even where payment is made to dependents.

> Provision is universally made in workmen's compensation acts for compensation not only to disabled employees but to the dependents of those whose injuries are fatal. And *the two kinds of payments are "always regarded as component parts of a single system of rights and liabilities arising out of" the relation of employer and employee. Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 414, 156 Pac. 491 Ann. Cas. 1917E, 390. The object of such acts "is single – to provide for the liability of the employer to make compensation for injuries received by an employee," whether to the employee himself or to those who suffer pecuniary loss by reason of his death. *Huyett v. Pennsylvania Railroad*, 86 N.J. Law, 683, 684, 92 Atl. 58.

Id. at 501 (emphasis added).

The Court expressly refused to examine the constitutionality of workers' compensation statutes by referring separately to the rights of employees and their dependents. *"These acts were sustained, in their entirety, without any separate reference to the status of the dependents." Madera*, 262 U.S. at 502 (emphasis added).

Further, the Court made clear that the purpose of workers' compensation statutes is to benefit employees, regardless of whether the benefits are actually paid to the

disabled employee or to his or her dependent survivors, and regardless of where those dependents may reside:

> Such employers' liability statutes are designed to benefit all employees. . . . [T]he action is given to the beneficiaries on their account and they are not intended to be less protected if their beneficiaries happen to live abroad . . . .
>
> "Many of these toilers in mines, on public works, railroads and the numberless fields of manual labor, receive a moderate wage and are compelled to leave in foreign lands those who are dependent upon them and for whose support they patiently work on, indulging the hope that ultimately they may bring to these shores a mother, or wife and children. . . . *The statute not only benefits the survivors, but protects the laboring man . . .* "

Madera, 262 U.S. at 503-504 (citations omitted) (emphasis added).

Madera's treatment of workers' compensation as a unitary system of compensation extending an umbrella of insurance coverage for the employee and his family is thus completely consistent with *Wengler*'s focus on the female employee denied equal coverage for her dependents under Missouri's workers' compensation statute. The Georgia Supreme Court expressly rejected this analysis in the instant case, leaping over the obvious punitive impact of a statutory classification scheme which deprives resident aliens of coverage for their non-resident beneficiaries while granting benefits to their American and Canadian co-workers.

B. AS A STATUTORY CLASSIFICATION BASED ON ALIENAGE, O.C.G.A. § 34-9-265(b)(5) MUST BE REVIEWED BASED ON THE "STRICT SCRUTINY" STANDARD OF CONSTITUTIONAL REVIEW.

"[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. at 372-373. Justice Blackmun's concurring opinion in *Toll v. Moreno*, 458 U.S. 1 (1982), elucidated the reasoning underlying such heightened judicial solicitude:

> In combination, these factors – disparate treatment accorded a class of "similarly circumstanced" persons who historically have been disabled by the prejudice of the majority – led the Court to conclude that alienage classifications "in themselves supply a reason to infer antipathy," *Personnel Administrator of Massachusetts v. Feeney*, 442 US 256, 272, 60 L Ed 2d 870, 99 S Ct 2282 (1979) and therefore demand close judicial scrutiny. This understanding, which is at the heart of the Court's modern alienage decisions, was unreservedly reaffirmed this Term in *Cabell v. Chavez-Salido*, 454 US, at 438, 70 L Ed 2d 677, 102 S Ct 735 ("citizenship is not a relevant ground for the distribution of economic benefits").

Id. at 21 (Blackmun, J., concurring).

Laws containing alienage classifications are therefore subject to "strict scrutiny" review. *Graham*, 403 U.S. at 376; *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Id.* at 219.

O.C.G.A. §34-9-265(b)(5) establishes a classification which clearly discriminates on the basis of the alienage of the employee's dependents and not on the basis of residence or other neutral factors. As the Kansas Supreme Court succinctly held in *Jurado v. Popejoy Construction Co.*, 853 P.2d 669 (1993), in striking down a comparable death benefits provision:

> Although the benefit limitation applies only to dependents who are nonresident aliens, to suggest that this makes it a classification based on residence is disingenuous. Nonresident United States citizens are entitled to the same benefits as resident citizens and resident aliens. *The statute's disparate treatment of these two classes of nonresidents is solely based on alienage.* Simply because the statute does not similarly discriminate against resident aliens does not make it any less an alienage classification.

Id. at 675 (emphasis added).

In *Nyquist*, 432 U.S. at 8-9, this Court ruled that a statute will be subjected to heightened scrutiny regardless of "the fact that the statute is not an absolute bar" to an award of benefits based on alienage, where the statute "served to discriminate only within the class of aliens." Just as the Kansas Supreme Court found with respect to its comparable state provision, O.C.G.A. §34-9-265(b)(5) "creates and treats differently a class of employees based on the alienage of the employees' dependents; it is a legislative classification based on alienage." *Jurado*, 853 P.2d at 675.

This large class of legal resident alien workers, which included Jose Morales, is penalized by working – often in the most disfavored or dangerous jobs in our society – under a law mandating discriminatory terms of workers' compensation insurance coverage for the value of their very lives.

The Court has applied strict scrutiny to strike down on equal protection grounds a range of state laws involving statutory classifications which discriminate on the basis of alienage. *E.g., Graham*, 403 U.S. 365 (conditioning the payment of welfare benefits to resident aliens on a durational residence requirement); *Bernal*, 467 U.S. 216 (alienage bar on notaries public); *Nyquist*, 432 U.S. 1 (state restriction on the receipt of state financial assistance for higher education by a sub-class of resident aliens); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976) (excluding aliens from the practice of engineering); *Sugarman*, 411 U.S. 634 (aliens barred from employment civil service permanent positions); *In Re Griffiths*, 413 U.S. 717 (excluding aliens from eligibility in the State Bar). *See also, Hampton v. Mow Sun Wong*, 426 U.S. 88.

The two narrow categories of cases which do not fall within the rule that discrimination based on alienage triggers strict scrutiny are wholly inapplicable to the instant case. First, the "political function" exception pertains to state statutes "that exclude aliens from positions intimately related to the process of democratic self-government." *Bernal*, 467 U.S. at 220. The second category of cases arises in the context of Congress's exclusive authority over naturalization and immigration policy which "dictate[s] a narrow standard of review of decisions made by the Congress or President in the area of naturalization and immigration." *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976). Thus, Congress, and not the states, may constitutionally enact legislation which distinguishes between the benefits and rights of aliens and citizens.

C. GEORGIA'S DISCRIMINATORY DEATH BENEFIT PROVISION FAILS TO SATISFY EQUAL PROTECTION ANALYSIS UNDER STRICT SCRUTINY OR UNDER A RATIONAL RELATIONSHIP TEST.

It is clear that Georgia's discriminatory limit on death benefits payable to workers based on the alienage of their families cannot survive equal protection review under strict scrutiny and cannot satisfy even the minimal requirements of the rational relationship test. As demonstrated below, the statute is irrational, meets no legitimate governmental interest, and is simultaneously both over and under inclusive in drawing its classification scheme.

While Georgia maintains no legislative history for its statutes, and no rationale for this classification scheme has been proffered by the State, a review of the arguments proffered by proponents of death benefits provisions which severely limit or deny recovery to the families of aliens killed in the course of their employment demonstrates that the strictures of equal protection analysis are not satisfied here.

1. There is No Rational Basis for Discriminating Between the Two Countries With Which This Nation Shares its Borders.

It is difficult to imagine any justification for the fact that Georgia's death benefit provision for workers' compensation insurance, which prohibits any recovery in excess of $1,000 by the non-resident families of alien workers killed on the job, exempts aliens who are citizens or residents of Canada. However, even more surprising is the fact that this is a common exception found among state workers' compensation laws, dating from when they were originally enacted. The only case to analyze this exception under the Equal Protection Clause found it to

be patently illegal. In finding that the provision failed to satisfy even the minimal requirements of the rational basis test, the Supreme Court of Florida stated:

> The $100,000 insurance benefit that is unavailable to petitioners in this instance is available to Canadian workers, even in cases where those workers are in this country illegally. What possible state purpose would justify giving a benefit to nonresident Canadians that it denied Mexicans? . . . However, we can discern no rational basis for the distinction drawn between the northern border and the southern one by this statute.

De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204, 207 (Fla. 1989). The dissenting opinion of Justice Benham in the Georgia Supreme Court opinion in *Morales*, likewise concluded:

> What we have in this controversy are two similarly situated hemispheric neighbors, Canada and Mexico, with dissimilar treatment of their citizens. . . . I find no justification for that distinction.
>
> Through the statutory scheme approved by the majority in this case, resident alien workers of Mexican citizenship who have nonresident families must wear a badge of inferiority.

Morales, App. 11A-13A (Benham, J., dissenting).

The irrationality of the statute is underlined by the fact that if Jose Morales' family had violated the immigration and naturalization laws of this country and resided with him illegally in this country at the time of his death, they would have received the full protection of the law. *See, De Ayala*, 543 So.2d at 207. *Cf., Plyler v. Doe*, 457 U.S. 202.

The legislation exempts citizens of the United States and Canada (*wherever* their dependents may reside), and

Canadian residents (of whatever nation they may be citizens) from the $1,000 limit on death benefits, and allows them a full recovery. Thus, it is untenable to argue that the statute is rational because it is intended to provide death benefits only to persons who might otherwise become public charges, dependent on the state for support when their breadwinner is killed at work. American and Canadian citizens living abroad, and persons of any nationality residing in Canada, are fully compensated under Georgia's statutory scheme, yet will not become charges dependent on an American state.

The argument must also fail that a $1,000 benefit is "rational" to compensate for the value of a life of a man or woman because the "cost of living" is presumed to be lower outside of this country. First, such a statement is unsupported by modern cost of living standards. Second, it ignores the fact that the supposedly diminished cost of living abroad is the same whether the dependent is an American or Canadian citizen, as opposed to the citizen of some other country. Yet, the former receive a fully compensable benefit, while all others receive a pittance.

2. "Administrative Ease" Cannot Justify the Discrimination Effected by this Provision.

In *Jalifi v. Industrial Commission of Arizona*, 644 P.2d 1319, 1322 (Ariz. 1982), the Arizona Supreme Court accepted (without any evidentiary showing) that the statutory limit on death benefits was justified by difficulties of proof and continuing administration arising because the dependents lived outside of the United States. However, such justification must fail in light of well established precedent of this Court:

> [A]lthough efficacious administration of government programs is not without some importance, the Constitution recognizes higher values than

> speed and efficiency. . . . And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality.

Frontiero v. Richardson, 411 U.S. at 690 (requirement that servicewoman's application for increased quarter's allowance and health benefits for husband be supported by showing that he was dependent upon her for more than one-half of his support, where servicemen required to make no such showing for wives, held unconstitutional). *See also, Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. at 152 (rejecting administrative convenience justification for discriminatory proof of dependency provision in Missouri workers' compensation law).

Indeed, since the burden of proof to come forward, make a claim and demonstrate eligibility through dependency falls upon the family of the deceased worker, it is inconceivable how this creates an increased burden, administrative or otherwise, upon the state. Nor does such a burden fall to the employer or the insurer. O.C.G.A. §34-9-13. *See, Argonaut Insurance Co. v. King*, 127 Ga. App. 566, 567 (1972); *Glenn Falls Indemnity Co. v. Jordan*, 56 Ga. App. 449 (1937). Furthermore, since citizens of the United States and Canada are not excluded from receiving benefits, *regardless of whether they reside in another foreign country* where such burdens of administration would be identical, this argument cannot stand.

The Georgia statute, like the statute struck down in Kansas, imposes a burden on the employer or insurer to pay a minimal sum to the survivors. In dismissing the "administrative difficulty" argument, the Kansas Supreme Court held that the threshold burden of establishing dependency as a question of fact and of distributing the "death benefit" to persons outside the country would exist notwithstanding the fact that the benefit paid was a paltry sum. *Jurado*, 853 P.2d at 677. "Finally, the

contention that administration of benefits would be an 'insurmountable task' may have been viable in 1911 [when this provision was enacted]. However, given the global economy within which we work, the task has become less difficult over the past 80 years." *Id.*

3. The Statute Cannot Be Justified on the Basis of Cost to the Employer or Insurer.

This provision cannot be justified as bearing any relationship to the cost to an employer or insurer of providing workers' compensation coverage to employees. Indeed, under Georgia's current regulatory system, when an alien is killed on the job and is survived only by dependents outside the U.S. or Canada, what results from the $1,000 death benefit cap is nothing but a windfall to the employer or insurance company.

First, the residence of employee dependents plays absolutely no role in the setting of premiums for workers' compensation insurance. Premiums are determined by ratings for individual jobs issued by licensed ratings corporations. O.C.G.A. §33-9-12. A premium rate is established for each job category based on consideration of danger and risk of injury. These rates are applied to the payroll amounts paid by employers for each such job category. O.C.G.A. §33-9-21(a)(2). The nationality of employees or the residence of their dependents is absolutely irrelevant to the setting of this premium payment. *Id.* Hence, the resulting reduction in death benefits when an alien is killed and is survived by family abroad – the money not sent to the worker's family – accrues as profit to the insurance company.

Second, if an employee dies without any dependents whatever, O.C.G.A. §34-9-358(a) provides that the employer or insurer must pay either one-half of the death benefits which would have been due if dependents had existed, or the sum of $10,000.00 (whichever is less) to a

common benefit pool (unrelated to death benefits) called the Subsequent Injury Trust Fund. Thus, an employer is economically ten times better off if an employee killed at work leaves dependents living outside the U.S. or Canada rather than leaving no dependents whatsoever.

The net effect of such irrational and unjustifiable discrimination is to create

> a 'throw-away' class of workers. . . . [E]mployers may with impunity derive considerable savings by skimping on safety precautions because it will be more economical to hire Mexican nationals with nonresident families for the most hazardous jobs, and let them die, than it would be to institute proper safety procedures. Such a result is totally at odds with the intent of the Workers' Compensation Act.

Morales, App. 13A (Benham, J., dissenting). *See also, De Ayala*, 543 So.2d at 207 n.7.

4. The Statutory Limit of $1,000 on Death Benefits for Alien Workers is an Anachronism Which Has Remained for 73 Years, While Death Benefits for All Other Workers Have Consistently Increased Over the Years.

In Georgia, the Workers' Compensation Act first passed in 1920 provided the present day $1,000 limit on recovery of death benefits for workers survived by nonresident aliens outside the U.S. and Canada, and has never been amended. In contrast, the 1920 statute provided a death benefit of $4,000 for all other workers and has been amended eleven times in the intervening 73 years, increasing benefits in 1920, 1922, 1939, 1955, 1963, 1968, 1973, 1974, 1975, 1985 and 1992 to current levels which provide benefits of up to $250 per week throughout the period of dependency. O.C.G.A. §34-9-261. While the statute caps the benefits for a worker survived only

by a dependent spouse to a maximum of $100,000 as of July 1, 1992 (O.C.G.A. §34-9-265(d)), benefits up to $250 per week continue for children through the age of majority or graduation from high school (whichever occurs later) so that these benefits could equal $234,000 over 18 years; or if the child attends college full-time, through age 22, totalling $286,000 over 22 years; or if disabled from working, the child could recover a lifetime of benefits totalling $845,000 through age 65. *See, Jurado,* 853 P.2d at 676-677.

No justification can support the crushing disparity of such inequity as it has evolved over the years.

5. The Purpose of Workers' Compensation Insurance is to Provide a Quid Pro Quo to Employees Sacrificing their Common Law Remedies for a Uniform System of Benefits Available in the Case of Injury or Death on the Job.

The major purpose for enactment of workers' compensation statutes throughout the nation was to insure that the cost of injury or death to workers would be compensated to the employee, without regard to negligence, through the payment of disability compensation, medical expenses, rehabilitation services, and death benefits. *E.g., Madera,* 262 U.S. 499. There is no question that the insurance coverage provided through these statutes comprises part of the benefits an employee automatically receives in accepting employment.

Part of the justification for enacting these laws was to ease the difficulty of recovery through the traditional common law tort system for individuals injured or killed in the course of their employment. The benefits accorded under the statutes were a *quid pro quo* for the sacrifice of common law remedies which were deemed to be barred by the availability of a recovery under workers' compensation. These statutory remedies became the exclusive

remedy for workers hurt on the job. *E.g., Jurado,* 853 P.2d at 674-675.

Thus a property interest is vested in the employee and he or she is legally entitled to a reasonable recovery in consideration of the sacrifice of common law remedies in tort and for wrongful death. This interest is deprived without due process when an employee is barred from exercising his or her common law rights of recovery against an employer for a death on the job in consideration of the payment of the sum of $1,000. *Cf., Pedrazza v. Sid Fleming Contractor, Inc.,* 607 P.2d 597, 601 (N.M. 1980) (non-resident alien dependents barred from any recovery of death benefits under the workers' compensation act are not precluded from using other legal remedies to recover for the injury and death of the worker). *See also, De Ayala,* 543 So.2d at 207.

Thus, it is clear for a myriad of reasons that this statutory alienage discrimination cannot withstand the test of strict scrutiny under the equal protection clause, and further could not satisfy even the minimal requirements of the rational relationship test. It should be declared unconstitutional.

D. CERTIORARI SHOULD BE GRANTED AS THE STATES ARE DIVIDED IN ANALYZING THE CONSTITUTIONALITY OF DEATH BENEFIT PROVISIONS WHICH DISCRIMINATE AGAINST EMPLOYEES SURVIVED BY NON-RESIDENT ALIEN DEPENDENTS.

Since 1980, six states have been confronted with constitutional challenges to state workers' compensation schemes which deprive alien dependents who reside outside of this country of death benefits comparable to those permitted the dependents of citizens. Each of these cases

has grappled with the equal protection argument presented here. Still other state workers' compensation statutes carry similarly discriminatory schemes. Review of this constitutional issue is important to resolve this important federal question in a manner which is uniform across state lines.

Most recently, the Supreme Court of Kansas held that a statutory ban on recovery of more than $750 to non-resident alien dependents of workers killed on the job violated the federal and state guarantees of equal protection. *Jurado,* 853 P.2d 669. The court held that determination of the constitutionality of the provision turned on consideration of the rights of the worker, and not those of his dependents. The court determined that although strict scrutiny applied to this classification based on alienage, the reasons advanced to support the statute failed to satisfy even the rational basis test.

Jurado followed another recent decision by the Supreme Court of Florida in *De Ayala,* 543 So.2d 204. In striking down the statute, the Florida court similarly held that the constitutional focus must be on the rights of the deceased worker, and not on his survivors. *Id.* at 206. As such, the court held that the Florida statute which limited the recovery of death benefits to $1,000 by all non-resident aliens (except those who resided in Canada) while all other persons received a maximum of $100,000 violated the equal protection rights of the worker. The court held that the statute survived neither strict scrutiny analysis based upon alienage, nor rational basis review. *Id.* at 207.

Three earlier cases had upheld the constitutionality of discriminatory death benefit provisions against equal protection challenge, each focusing on the rights of the dependents, and not of the deceased worker. *See, Alvarez Martinez v. Industrial Commission of Utah,* 720 P.2d 416 (Utah 1986); *Pedrazza,* 607 P.2d 597; *Jalifi,* 644 P.2d 1319. In *Jalifi* the court refused to hold that the equal protection

clause was inapplicable to evaluating the rights of the alien dependents, finding that the "petitioner is conferred some benefits by the Arizona State Legislature, which may provide the requisite nexus to bring her within the purview of the equal protection clause." *Id.* at 1321 n.2. Nonetheless, the court upheld the provision limiting a non-resident alien dependent's recovery of death benefits to 60% of those otherwise available by law.[2]

This split in the decisions of the courts of last resort for six states on an important constitutional question justifies the grant of certiorari here to create uniformity on an important federal question.

III. O.C.G.A. §34-9-265(b)(5) IS INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT IMPOSES A DISCRIMINATORY BURDEN UPON ALIENS LAWFULLY WITHIN THE UNITED STATES AND CONFLICTS WITH CONGRESS'S EXCLUSIVE CONSTITUTIONAL AUTHORITY TO REGULATE IMMIGRATION AND NATURALIZATION.

The federal government is vested with broad and comprehensive powers over the admission of aliens derived from the Constitution's specific grants of exclusive authority over naturalization and foreign relations. U.S. Constitution, Art. I, §8, cl 3 and 4; *Toll v. Moreno*, 458 U.S. 571-572; *Graham v. Richardson*, 403 U.S. at 376-383; *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419

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[2] Arguably, Georgia's restrictive statutory scheme is the most onerous of all of the state laws reviewed. While Arizona limited death benefits to 60% of the statutory maximum otherwise provided (*Jalifi*), and Utah used a 50% cap (*Alvarez*), Georgia's statute limits recovery to $1,000. Although New Mexico allowed no recovery to persons residing outside of this country, the court refused to bar a tort action by the family to recover for the wrongful death. *Pedrazza*, 607 P. 2d at 601.

(1948). "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration and have accordingly been held invalid." *Id.* at 419.

State laws that impose burdens upon residence linked to alienage which are not authorized by or consistent with federal law have been repeatedly held unconstitutional. "Read together, *Takahashi* and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.' " *Toll*, 458 U.S. at 12. (citations omitted). As this Court held in *Takahashi*, invalidating a state law precluding citizens ineligible for citizenship under federal law from obtaining fishing licenses: The Fourteenth Amendment and civil rights laws promulgated thereunder "embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." *Takahashi*, 334 U.S. at 419-420.

A wide range of state statutes denying such "equality of legal privileges" have been declared violative of the Supremacy Clause. *E.g.*, *Toll*, 458 U.S. 1 (state university financial aid regulation denying "in-state" preferential financial aid status to a class of nonimmigrant aliens); *Graham*, 403 U.S. at 376-383 (durational residence condition on aliens' receipt of welfare benefits) and cases cited therein; *Truax v. Raich*, 239 U.S. 33 (1915).

In the instant case, O.C.G.A. §34-9-265(b)(5) imposes a severe and punitive burden on the terms of residence for alien workers lawfully in this country who have nonresident alien dependents. This burden rendered Jose Morales' daily labors for Barge-Wagener Construction

Company, not to mention his life, effectively valueless upon his death, when compared to the treatment of his fellow workers. The statute's imposition of such unequal terms and conditions of employment based upon alienage is neither authorized by nor consistent with federal law and therefore must be declared invalid under the Supremacy Clause.

IV. CONCLUSION

While twentieth century history might imply that America has a longstanding record of discrimination against aliens, it is in fact a relatively modern phenomenon. Indeed, a longer view of our history instructs that aliens were not only spared the discriminatory exclusion policies that characterized the early part of this century, but were traditionally accorded most of the incidents of citizenship until the late nineteenth century. *E.g.*, *The Alien and the Asiatic in American Law*, 1 (1946); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 & n.30.

It is hardly novel to urge that the protection of the Fourteenth Amendment must be applied in light of evolving standards of decency in this society. This country's long struggle with racism and discrimination on the basis of alienage are certainly hallmarks of those evolving standards. *In Re Griffiths*, 413 U.S. at 719-720. Thus, it is with a skeptical eye that the Court must view the anachronism of workers' compensation laws enacted at the turn of the century which continue to discriminate grievously against workers killed in the course of their employment today. Georgia's discriminatory statute fundamentally violates the Fourteenth Amendment's equal protection mandate as applied by this Court's precedents.

The petition should be granted and the judgment of the Georgia Supreme Court reversed.

Dated: Atlanta, Georgia, September 16, 1993.

Respectfully submitted,

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SUPREME COURT OF GEORGIA

ATLANTA JUNE 18, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93A0252

BARGE-WAGENER CONSTRUCTION COMPANY ET AL. V. JOSE ANTONIO MORALES ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Sears-Collins, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

In the Supreme Court of Georgia

Decided: May 24 1993

S93A0252. BARGE-WAGENER CONSTRUCTION COMPANY et al. v. MORALES et al.

CLARKE, Chief Justice.

Jose Morales was employed as a construction worker by Appellant Barge-Wagener when he fell to his death from a building on which he was working. His wife and two minor children survive him. They are citizens of Mexico and reside in that nation.

The State Board of Workers' Compensation ("Board") granted $1,000 in benefits to Mr. Morales' widow and minor children as required under O.C.G.A. § 34-9-265(b)(5).[1] The beneficiaries appealed the decision to the superior court alleging that the statute violates the equal protection clause of the Georgia Constitution. The superior court reversed the decision of the Board. Looking to a Florida Supreme Court's invalidation of a nearly identical Florida statute, the superior court held that alienage is a suspect classification. The court went on to hold that the statute could not withstand the requirements of strict scrutiny under the equal protection clause.

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[1] This section reads:

(b) If death results instantly from an accident arising out of and in the course of employment . . . the compensation under this chapter shall be as follows:

. . .

(5) If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

Barge-Wagener and its insurer, Argonaut Insurance Company, filed an application for discretionary appeal. We granted the application and now reverse.

This case raises two issues. First, whose rights are at stake, the decedent worker's or the nonresident dependents'? Second, does O.C.G.A. § 34-9-265(b)(5) violate the pertinent party's rights under the Georgia Constitution?

1. The first step of our inquiry is to decide in whom the workers' compensation benefits are vested. Our analysis begins with an examination of the statute. Upon the death of an employee, the employer must pay benefits to the employee's dependents under O.C.G.A. § 34-9-265. Two types of benefits are payable after the death of the employee. The employer must "pay the reasonable expenses of the employee's last sickness and burial expenses not to exceed $5,000. If the employee leaves no dependents, this shall be the only compensation." O.C.G.A. § 34-9-265(b)(1). In addition, the employer must pay to the employee's dependents a portion of "a weekly compensation which is provided for in Code Section 34-9-261." O.C.G.A. § 34-9-265(b)(2).

Death benefits under workers' compensation statutes are separate and distinct from the right to compensation vested in the employee by reason of injury. *See International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 115 A.L.R. 896 (2d Cir.), *cert. denied*, 304 U.S. 565 (1938). Death benefits do not become part of the estate of the deceased, and are not liable for his debts, "but is the exclusive property of the beneficiaries." 82 Am. Jur.2d, *Workers' Compensation* § 187, at 184 (1992). The death benefits are intended to compensate the beneficiaries for their injury,

which is the loss of support resulting form [sic] the death of the deceased worker. This is not merely the survival of the rights of the deceased; the rights to death benefits do not accrue until the death of the worker.

In this respect, the workers' compensation scheme is analogous to the right of recovery under the wrongful death statute, O.C.G.A. §§ 51-4-2 and 51-4-3. Although based on an actionable tort upon the decedent, this statutorily created action is not a property right of the decedent's estate. *Boggan v. Boggan*, 145 Ga. App. 401, 401 (243 SE2d 664) (1978). The wrongful death action, like death benefits under workers' compensation, are rights vested in the surviving family. *Dixon v. Ross*, 94 Ga. App. 187, 188 (94 SE2d 86) (1956).

The sickness and burial expenses are not like death benefits; they are for the benefit of the decedent's estate. As such, these payments are a property right of the decedent employee.

Given the provisions of the statute, we find that the legislature intended the rights to death benefits to vest in the dependents while making the burial expenses recoverable by the decedent's estate. We conclude that the dependents must assert their own rights to the benefits and cannot rely on the constitutional status of the decedent.

2. The second prong of our inquiry applies the equal protection clause to these two sets of property rights.

The equal protection clause of the Georgia Constitution[2] is "substantially equivalent" to the equal protection clause of the fourteenth amendment of the U.S. Constitution[3]. *McDaniel v. Thomas*, 248 Ga. 632, 638 (285 SE2d 156) (1981); *Suber v. Bulloch County Bd. of Educ.*, 722 FSupp 736 (S.D. Ga. 1989). O.C.G.A. § 34-9-265 clearly discriminates between U.S. and Canadian citizens and residents on the one hand and all other nonresident aliens on the other. The question, however, is whether the discrimination is an unlawful one.

Aliens are treated under United States law under an ascending hierarchy of rights and privileges. The U.S. Constitution "expressly accord[s] differing protection to aliens than to citizens." *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (110 SC 1056, 108 LE2d 222) (1990). Resident aliens are entitled to important constitutional rights guaranteed under the equal protection and due process clauses. *Yick Wo v. Hopkins*, 118 U.S. 356 (6SC 1064, 30 LE 220) (1886). The superior court and appellees, however, do not distinguish between aliens within the jurisdiction of the United States and aliens residing outside this country. The United States Supreme Court, however, has been clear that it is the alien's presence within its territorial jurisdiction that gives the Judiciary power to act. *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (70 SC 936, 94 LE 1255) (1950). We hold that the equal protection clause does not

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[2] "No person shall be denied equal protection of the laws." GA. CONST. art. 1, § 1, ¶ 1.

[3] "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

extend to nonresident aliens and that the Board correctly awarded death benefits under O.C.G.A. § 34-9-265(b)(5).

Aliens outside the borders of the United States are subject to their own nations [sic] laws and cannot invoke the protections reserved for citizens and residents of the United States. O.C.G.A. § 34-9-265(b)(5) surely discriminates against Mr. Morales's family in Mexico, but it is not unlawful. They must settle for what the legislature of this state is willing to provide.

The superior court agreed with the reasoning of the Florida Supreme Court in a case striking down an almost identical statute.[4] *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So.2d 204 (Fla. 1989). The decision of the Florida Court rested on the conclusion that the dependents were asserting the rights of the decedent employee. Since the equal protection clause extends to resident aliens, the denial of full death benefits was held unconstitutional. Our decision turns on the finding that the death benefits are the property of the nonresident dependents. As a result, the dependents cannot assert the resident employee's constitutional rights. *See De Ayala, supra* at 208-09 (Overton, J. dissenting).

3. Notwithstanding our holding above, we find that the decedent's estate has the right to reasonable burial expenses under the O.C.G.A. § 34-9-265(b)(1). *See Hartford Accident & Indem. Co. v. Braswell*, 85 Ga. App. 487 (69 SE2d

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[4] The Florida statute is nearly identical to our own statute. FLA. STAT. ANN. ch. 440.016(c)(7). In 1987, however, the Florida legislature increased the amount of compensation from $1,000 to $50,000. 1987 Fla. Laws ch. 87-330 § 4.

385) (1952) (finding that widow acting in capacity of personal representative of the estate may bring action for disability compensation). Burial expenses are to be paid "in addition to any other compensation." O.C.G.A. § 34-9-265(b)(1). Subsections (2) through (5) explain the amounts of dependent benefits that are to be paid subject to whether the dependents are totally or partially dependent on the employee. In the present case, the total dependent "compensation shall not in any case exceed $1,000." O.C.G.A. § 34-9-265(b)(5). Since burial expenses granted under subsection (b)(1) are not compensation for dependents, the employee's estate is entitled to this payment.[5] We find that the workers' compensation benefits to be paid to appellees should also include reasonable burial expenses, up to $5,000.

Constitutional requirements also mandate this result. The state cannot deny burial expenses to the estate of Mr. Morales simply because he is an alien or has dependents who are aliens. Burial expenses are the property of Mr. Morales's estate. The equal protection clause extends to all those within the jurisdiction of the United States. To deny the benefits of burial expenses to Mr. Morales because of his alienage or the alienage of his family is an

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[5] O.C.G.A. § 34-9-265 was first passed in 1920 in essentially the same form in which it now appears. Ga. Laws 1920, p. 188, § 38. While the amount of compensation for burial expenses increased from $100.00 in 1920 to $5,000.00 in 1985, Ga. Laws 1985, p. 727, § 11, the benefits paid to nonresident dependents remained at $1,000.00 Apparently, the legislature intended these sections to be independent payments.

arbitrary exercise of the law in violation of the equal protection clause.[6]

In summary, we find that the limitations on death benefits contained in O.C.G.A. § 34-9-265(b)(5) do not violate the equal protection clause of the Georgia Constitution. The denial of burial expenses to the estate of Mr. Morales, however, is reversed.

Judgment reversed. All the Justices concur, except Benham and Sears-Collins, JJ., who dissent.

In the Supreme Court of Georgia

Decided:

S93A0252. BARGE-WAGENER CONSTRUCTION COMPANY v. MORALES

BENHAM, Justice, dissenting.

This matter is before the court mainly to determine whether OCGA § 34-9-26 (b) (5) violates the Equal Protection Clauses of the Georgia Constitution and the United States Constitution. Turning briefly to the facts, we see that Jose Morales, age 31, was employed as a construction

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[6] There does not appear to be evidence in the record showing whether Mr. Morales is a permanent resident, temporary resident, or U.S. Citizen. However, we need not decide his residency status here. It is sufficient to say that he is entitled to equal protection rights. Denial of his burial benefits based on his status or the status of his relatives is arbitrary and capricious and cannot stand even under a rational basis scrutiny.

worker for appellant on September 19, 1990, when he fell 22 stories to his death. He left as dependents a wife and two small children who reside in Mexico. They filed a claim for Worker's Compensation benefits and were awarded the sum of $1,000 under OCGA § 34-9-265 (b) (5). They appealed that award to the Fulton County Superior Court which found the statute in question to be violative of the Equal Protection Clauses of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution. On this appeal from that decision a majority of this court, relying in part on the opinion of a lone dissenter of the Florida Supreme Court, has determined that there is no equal protection violation. Finding myself in disagreement with that view as expressed in Divisions 1 and 2 of the majority opinion, I must respectfully dissent.

1. In reaching its decision, the majority first, and in a very artful manner, determined that benefits provided under OCGA § 34-9-265 (b) (5) belong to the dependents and not to the employee's estate. In support of that approach, the majority opinion analogized the Workers' Compensation statute to the Wrongful Death statute, concluding that the legislature intended for death benefits under the Workers' Compensation statute to vest exclusively in the dependents as they do under the Wrongful Death statute. Having made those determinations, the majority easily dismissed the claim of an equal protection violation because the nonresident-alien dependents no longer have standing to pursue it. However, the analogy to the Wrongful Death statute is fatally flawed. While the right to recover for the death of a family member in a wrongful death action clearly and properly belongs to the

survivors, the benefits which flow from the workers' compensation system are benefits afforded to the **worker** in exchange for giving up the right to seek redress for injuries suffered on the job. As the Supreme Court of Florida noted, "[o]ne of the primary benefits that an employee works for is the satisfaction and well-being of providing for his or her family." *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So2d 204, 207 (Fla 1989). It is painfully ironic that the majority's analysis of this case results in an employee having bargained away a right of action which may have sustained his family after his death in exchange for the right to benefits his family is denied solely because they are not resident in this country.

In considering this matter of standing, we need look no further for guidance than to our sister state of Florida which, in considering the same issue, determined that the dependents were pursuing the rights of the deceased worker and, therefore, that they had standing to challenge the constitutionality of the statutory scheme. In *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, supra at 206, the Florida Supreme Court held as follows:

> [W]e do not perceive this case as hinging on the constitutional rights of the surviving dependents, but on the constitutional rights of the worker, now deceased. . . . This case concerns whether a worker who happens to have dependents residing out of the country is entitled to the same fruits of his or her labor as any other worker, including the same insurance benefits where the state has required those benefits to be provided. It thus is immaterial that petitioners

> happen to be nonresident aliens, since they have standing in this context as his beneficiaries[.]

We should reach the same conclusion here in Georgia because, as was the case in Florida, the benefits in question were generated by the employee's labor and flowed through him to the intended beneficiaries, his dependents. We should recognize their standing to enforce the rights which Mr. Morales earned by his labor while resident in this country.

2. Having concluded that the nonresident-alien dependents of Mr. Morales have standing to challenge the constitutionality of OCGA § 34-9-26 (b) (5), I now turn to the issue of whether a statutory scheme which provides different benefits to similarly situated persons denies equal protection.

What we have in this controversy are two similarly situated hemispheric neighbors, Canada and Mexico, with dissimilar treatment of their citizens. Resident aliens whose nonresident dependents are Canadian citizens are accorded full rights; resident aliens whose dependents are Mexican citizens are accorded abbreviated rights. Clearly, this is unequal treatment. However, unequal treatment standing alone is not enough to constitute a constitutional violation.

We must determine, therefore, whether this dissimilar treatment rises to the level of constitutional impermissibility. The claim is made that this conduct is violative of the Equal Protection provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution, which provisions are, as the majority points out, substantial equivalents. Again,

we would do well to heed the words of the Florida Supreme Court:

> In evaluating claims of statutory discrimination, a statute will be regarded as inherently 'suspect' and subject to 'heightened' judicial scrutiny if it impinges too greatly on fundamental constitutional rights flowing either from the federal or [state] constitutions, or if it primarily burdens certain groups that have been the traditional targets of irrational, unfair, and unlawful discrimination. [Cits.]

De Ayala v. Florida Farm Bureau Cas. Ins. Co., supra at 206. On that issue, the decisions of the U.S. Supreme Court

> have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority [cit.] for whom such heightened judicial solicitude is appropriate.

Graham v. Richardson, 403 US 365, 372 (91 SC 1848, 29 LE2d 534) (1971). The Supreme Court went on in *Graham* to note that where a suspect classification is involved, there must [sic] a compelling state interest to justify it. No such compelling interest has been articulated or is present in this case. Here we have a deceased employee who, although not a citizen but a resident alien, paid taxes, contributed to the economic growth of this country, and bore the same burdens as other employees; yet his dependents are denied the fruits of his labor, specifically workers compensation benefits, because they were not residents of this country at the time of his death. At the

same time, Canadians, who are also hemispheric neighbors, are accorded full benefits. I find no justification for that distinction.

Through the statutory scheme approved by the majority in this case, resident alien workers of Mexican citizenship who have nonresident families must wear a badge of inferiority. While we are bound to uphold the laws, we are not bound to do so without giving thought to matters of policy and justice, neither of which would be served by creating a "throw-away" class of workers. Yet, we must recognize that a likely result of the majority's holding in this case is that employers may with impunity derive considerable savings by skimping on safety precautions because it will be more economical to hire Mexican nationals with nonresident families for the most hazardous jobs, and let them die, than it would be to institute proper safety procedures. Such a result is totally at odds with the intent of the Workers' Compensation Act.

For the reasons stated above, I must dissent to the majority's reversal of the trial court's judgment. I am authorized to state that Justice Sears-Collins joins in this dissent.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOSE A. MORALES, Deceased/Employee vs. JULIA CORPUS de MORALES, Widow, JUAN ANTONIO MORALES, and DANIEL MORALES, Minor Children, Employer and ARGONAUT INSURANCE COMPANY, Insurer	)	CIVIL ACTION FILE NO. E-03875

ORDER REVERSING THE DECISION OF THE WORKERS' COMPENSATION BOARD

Jose Morales, the decedent, fell 22 stories to his death while employed as a construction worker by Barge-Wagener Construction Company. He is survived by his wife and two minor children, who reside in Mexico. Mr. Morales' death was covered by the Georgia workers' compensation statute.

The State Board of Worker's Compensation ("Board") granted $1,000 in benefits to Mr. Morales' widow and minor children, as set forth in O.C.G.A. § 34-9-265(b)(5). The beneficiaries have appealed that decision.

The issue before this Court is whether the statute which provided these death benefits violated the equal

protection clause of the Fourteenth Amendment and/or the equal protection clause of Art. I, § 1, Par. 2 of the Georgia Constitution as it might relate to the petitioners. Petitioners contend that the Board's decision is incorrect because the statute is unconstitutional on its face and as applied to petitioners. They argue that the statute violates Art. I, § 1, Par. 2 of the Georgia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The relevant provision of the Workers' Compensation Act, O.C.G.A. § 34-9-265, provides in pertinent part:

> If the employee leaves dependents who are not citizens or residents of the United States *or the Dominion of Canada* at the time of the accident, the amount of compensation shall not in any case exceed $1,000. [Emphasis added.]

Petitioners cite *De Ayala v. Florida Farm Bureau Cas. Inc.*, 543 So.2d 205 (Fla. 1989), in support of their contention that the statute is unconstitutional. The Florida Supreme Court held that a statute substantially similar to the Georgia statute in the instant case was unconstitutional. In *De Ayala*, the Florida statute was challenged on equal protection grounds. That Court reasoned that the case turned upon the constitutional rights of the decedent at the time of his death and that the dependents had standing as beneficiaries of the deceased.

The Florida Court concluded that alienage is a suspect class and thus applied. *De Ayala, supra* at 207. The Florida employer argued there was a valid reason to give preferred treatment to nonresident Canadians over nonresident Mexicans because "the U.S. and Canada share

one of the largest unprotected borders in the entire world." *De Ayala, supra.* That Court could "discern no rational basis for the distinction drawn between the northern border and the southern one by this statute." *De Ayala, supra.*

In Georgia, dependents may not assert the constitutional rights of the deceased worker. They may, however, assert their own rights granted by the statute and protected by both the Georgia and the United States Constitutions.

In the instant case, the respondent urges the Court to follow the Utah and New Mexico Courts which have determined that nonresident aliens are beyond the protection of the equal protection clause because they are not within the state's jurisdiction. In *Pedrazza v. Sid Fleming Contractor, Inc.*, 607 P.2d 597, 600 (N.M. 1980), that Court held:

> The purpose of the equal protection clause is to protect persons and groups within United States jurisdiction from being singled out and subjected to hostile legislation.

In the Arizona case, however, that Court did not go so far as to hold that the equal protection clause does not apply. In fact, the Court stated that "petitioner is conferred some benefits by the Arizona State Legislature, which may provide the requisite nexus to bring her within the purview of the equal protection clause." *Jalifi v. Industrial Comm. of Arizona*, 644 P.2d 1319, 1321 n.2 (Ariz. 1982).

The equal protection provisions in the Georgia Constitution are "substantially equivalent of equal protection of the laws under the U.S. Constitution." *McDaniel v.*

Thomas, 248 Ga. 632, 638 (1981). The Georgia Constitution equal protection clause provides:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws. Ga. Const. Art. I, § 1, Par. 2.

In Georgia, a strict judicial scrutiny standard " . . . is employed when a classification involves socially stigmatic inequalities, such as those based upon race. . . . The governmental classification will fail unless the government demonstrates that the classification is *necessarily* related to a compelling governmental objective. [cit.] Application of the strict scrutiny test means that the classification is not entitled to the usual presumption of validity." *McDaniel v. Thomas*, *supra* at 639, quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

O.C.G.A. § 34-9-265 provides death benefits to dependents of workers covered under the Act. The statute confers a benefit commensurate to a property right upon the dependent beneficiaries.

The Georgia Court of Appeals held in *Freeman Decorating Co. v. Subsequent Injury Trust Fund*, 175 Ga. App. 369, 333 S.E.2d 204 (1985), that workers' compensation benefits survived the death of the dependent and awarded the dependent's estate the benefits derived from the employee's death. The majority opinion stated:

> The policy of the Workers' Compensation Act, with respect to the payment of death benefits, is to provide a measure of compensation to persons suffering a direct loss of support because of

> the death of an employee as a result of his employment.

In dissent, one judge criticized the majority holding, writing:

> [a] workers' compensation death benefit, unlike tort compensation, is not a property right which survives in favor of heirs, it is an award designed to protect the dependents from financial insecurity.

While the dissenting judge did not recognize the property right granted by the majority, he did recognize that the award was designed to protect the dependents.

O.C.G.A. § 34-9-265(b)(5) confers upon nonresident aliens the status of dependents entitled to death benefits. The benefits granted by the statute provide a nexus bringing petitioners' claim within the purview of Georgia's equal protection clause. The statute confers these benefits in violation of the Georgia Constitution. The protection granted by O.C.G.A. § 34-9-265(b)(5) is not impartial. The petitioners, nonresident aliens, are being denied equal protection under the Georgia Constitution because they are denied death benefits available to nonresident aliens from Canada.

It is this Court's opinion that the statute at issue violates equal protection. The classification in the statute involves alienage, one of the traditional suspect classes. Therefore, the strict scrutiny standard is employed. In addition, the right impinged is one which the State of Georgia has held commensurate to a property right.

Under the strict scrutiny standard, the statute impinges too greatly upon a fundamental constitutional

right granted under the Georgia Constitution. Under the strict scrutiny analysis, the classification created by the statute must be "structured with precision and . . . tailored narrowly" to serve a *compelling* governmental objective. *McDaniel, supra* at 639.

Because this Court has determined that O.C.G.A. § 34-9-265(b)(5) violates the Georgia Constitution, it is not necessary to reach the merits of petitioners' claim under the United States Constitution.

The decision of the State Board of Workers' Compensation is REVERSED.

The case is remanded to the Board for reconsideration in light of the Court's decision.

SO ORDERED, this 28th day of August, 1992.

/s/ Don A. Langham
DON A. LANGHAM, Judge
Superior Court of Fulton County

LOGO

STATE BOARD OF WORKERS' COMPENSATION

Suite 1000, South Tower
One CNN Center
Atlanta, Georgia 30303-2788

Claim Number: 451-93-5853
Accident Date: September 19, 1990
Case Of: Jose A. Morales, Desd.
Date: June 17, 1992

Jose A. Morales, Deceased	Employee
Julia Corpus de Morales, Widow Juan Antonio Morales and Daniel Morales, Minor Children Post Office Box 89121 Atlanta, Georgia 30312	Claimants
Barge-Wagener, Incorporated 1815 The Exchange Atlanta, Georgia 30339	Employer
Argonaut Insurance Company Post Office Box 720293 Atlanta, Georgia 30358	Insurer
Bonny Berry Wilder Northeast Business Center 5725 Buford Highway, Suite 117 Doraville, Georgia 30340	Counsel for Claimants
Michael Thorpe Two Decatur TownCenter, Suite 520 125 Clairemont Avenue Decatur, Georgia 30030	Counsel for Employer/ Insurer

Subsequent Injury Trust Fund Two Northside 75, Suite 124 Atlanta, Georgia 30318-7784	Party In Interest
Dana E. McDonald 133 Carnegie Way, Suite 508 Atlanta, Georgia 30303	Counsel for S.I.T.F.

This claim is before the Board for review of the award of Judge Killingsworth dated March 13, 1992.

Upon de novo consideration of all evidence, the Board makes the findings and conclusions of the administrative law judge its findings of fact and conclusions of law.

AWARD

The award of Judge Killingsworth, dated March 13, 1992, is made the award of the Board.

IT IS SO ORDERED, this the 17th day of June, 1992.
Concurring: Directors Don L. Knowles and Claude A. Bray, Jr.

STATE BOARD OF WORKERS' COMPENSATION

/s/ James W. Oxendine
JAMES W. OXENDINE,
CHAIRMAN

LOGO

STATE BOARD OF WORKERS' COMPENSATION

Suite 1000, South Tower, One CNN Center
Atlanta, Georgia 30303-2788

CLAIM NUMBER 451-93-5853
ACCIDENT DATE 09/19/90
DATE March 13, 1992
CASE OF Jose A. Morales

RE: Jose A. Morales	Employee/ Deceased
Julia Corpus de Morales Juan Antonio Morales Daniel Morales P.O. Box 89121 Atlanta, GA 30312	Widow/ Claimant Minor Children
Barge-Wagener, Inc. 1815 The Exchange Atlanta, GA 30339	Employer
Argonaut Insurance Company P.O. Box 720293 Atlanta, GA 30358	Insurer
Bonny Berry Wilder Northeast Business Center 5725 Buford Highway Suite 117 Doraville, GA 30340	Counsel for Dependents
Michael Thorpe Two Decatur TownCenter 125 Clairemont Avenue Suite 520 Decatur, GA 30030	Counsel for Employer/ Insurer

Subsequent Injury Trust Fund Two Northside 75 Suite 124 Atlanta, GA 30318-7784	Party-In-Interest
Dana E. McDonald 133 Carnegie Way #508 Atlanta, GA 30303	Counsel for SITF

Based upon application of the claimant, a hearing was scheduled and held in Atlanta, Georgia on October 28, 1991, to determine all Title 34-9 issues in connection with the death of employee Jose A. Morales on September 19, 1990.

The record closed on October 28, 1992, and the transcript was filed with he [sic] Board November 13, 1992. Additional time was provided for the submission of briefs.

STIPULATIONS AND ISSUES

The only dispute betwen [sic] the claimant-dependents in this case and the employer/insurer is the constitutionality of O.C.G.A. 34-9-265(b)(5), which specifically limits the amount of recovery which may be had in a workers' compensation death case in which no surviving dependent is a resident of either the United States or Canada. Therefore, a stipulation of facts was tendered into the record by both parties, which includes the following: The parties have stipulated that they are subject to the Act, and the Board has jurisdiction of this claim. The accident occurred in Fulton County, Georgia, and venue is proper. General employment at an average weekly wage of $450.00, and notice of an accident, were also stipulated. The employer, Barge-Wagener Construction Company, had workers' compensation insurance

coverage with Argonaut Insurance Company on the date of accident.

The parties have further stipulated that the employee sustained an accident arising out of and in the course of his employment on September 19, 1990, resulting in his death, and that the accident constituted a compensable event under the Georgia Workers' Compensation Act. Juan Antonio Morales, Daniel Morales, and Julia Corpus de Morales qualify as dependents entitled to death benefits pursuant to the Georgia Workers' Compensation Act, and there are no other individuals who are entitled to receipt of benefits in this claim. None of these dependents were either citizens or residents of the United States or Canada at the time of the death of the employee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the stipulations of the parties, and a consideration of all admissible evidence, I find as fact and conclude as matters of law the following:

1. On September 19, 1990, Jose Antonio Morales fell approximately 20 stories to his death while working for Barge-Wagener Construction Company. At that time, his widow and dependent children were residents of Mexico, and were solely dependent upon the employee for their support. There are no disputes as to the facts in this case, and the sole remaining issue is one of law.

2. The dependents in this claim have disputed the constitutionality of O.C.G.A. 34-9-265(b)(5), arguing that it is a clear violation of the equal protection amendment of both the State of Georgia and the United

States Constitutions, denying the dependents a reasonable recovery under the Workers' Compensation Act, while at the same time denying them the opportunity to file a tort action against the employer in this case. It is my opinion that the dependents will prevail on this issue, there being no apparent rational basis for the legislature to distinguish between citizens of Canada and citizens of any other country that might be working in the United States and injured on the job.

3. Nevertheless, while the dependents are required to raise this challenge initially before this administrative agency, the board does not have the authority to declare the statute unconstitutional, and resolution of the constitutional question must await judicial review on appeal in a court of equity. *Flint River Mills v. Henry*, 234 Ga. 385 (1975).

4. As distasteful as it is for me to do so, I am constrained to apply O.C.G.A. 34-9-265 to the facts in this case at this time. I find that Julia Corpus de Morales, Juan Antonio Morales, and Daniel Morales are entitled to receipt of the sum of $1,000.00 as the result of the death of Jose Antonio Morales at work on September 19, 1990.

AWARD

WHEREFORE, based upon the above findings and conclusions, the employer/insurer are directed to pay to Julia Corpus de Morales the sum of $1,000.00 on behalf of herself and her children, as compensation for the death of her husband on September 19, 1990.

IT IS SO ORDERED, this 13th day of March, 1992.

STATE BOARD OF WORKERS'
COMPENSATION

/s/ Patricia M. Killingsworth
PATRICIA M. KILLINGSWORTH
Administrative Law Judge

PMK/crs